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STANDARD TREATISES AS EVIDENCE.

There is considerable diversity of opinion on the question of use of standard treatises as evidence. Their use is frequently permitted in the cross-examination of expert witnesses, but not for the purpose of proving facts. The case of Laird v. Railroad, 117 Atl. 591, recntly decided by the Supreme Court of New Hampshire, holds that standard treatises may be used on cross-examination to discredit the testimony of an expert witness. The argument which has prevailed in some jurisdictions that the result of such cross-examination is to put before the jury, as positive evidence, the unsubstantiated opinions of the authorities referred to, the Court declared is not warranted by the situation presented. "The books abound in instances of evidence admissible and received for one purpose, but not for another. * * * The view that the opinions used upon cross-examination thereby become positive evidence, leaves wholly out of consideration the fact that such opinions, being the foundation for the witness' opinion, are used solely to test its value, and assumes that trial courts and juries are either unable or unwilling to deal intelligently and fairly with restricted evidence."

Touching other objections to the use of such books in this manner, the Court said:

"The objection to such procedure upon the ground that it violates the hearsay rule and permits the use of opinions which are not subject to cross-examination is unsound, or else it proves too much. If the opinion of one who is an authority cannot be used at all unless the holder of it be sworn and be subject to cross-examination, by what logic can the same inadmissible opinion b used as a basis for the admissible opinion of the expert witness? The opinion of the expert, qualified by study, is admitted as an exception to the hearsay rule. It is known to be founded upon the assertions of other (1 Wig. Ev., Sec. 687). Whether it shall be admitted or rejected depends upon the witness' familiarity with the hearsay. Unless he is thoroughly versed in that hearsay, he is not qualified to testify. The reasoning of courts excluding inquiries about the authorities, upon the cross-examination of the expert, leads directly to the conclusion that the opinion of the expert should have been excluded. If the cross-examination puts before the jury the unsworn opinion of the authority, the direct testimony of the expert does the same thing, with the added infirmity involved in his recollection of what the authorities say.

"The objection to this procedure is unsound for another reason. It appearing that certain printed books are received by the profession as authorities and as truly setting forth the views of certain authors, opinions based thereon are admitted in evidence. When the witness is confronted with the contents of one of these books which denies the views he has expressed, the issue presented is not whether the book states the true opinion of the author, but whether the witness has honestly and intelligently read and applied what is set down in the books (Baldwin v. Gaines, 92 Vt., 61, 102 Atl. 338)."

The expert may be cross-examined as to questions which are framed by use of quotations from books of recognized authority (Williams v. Nally, 20 Ky. L. Rep., 244). He may likewise be asked as to what position various authorities take in regard to the particular subject upon which he is being cross-examined (Brodhead v. Wiltse, 35 Ia., 429). The purpose for which such standard works are permitted to be used upon cross-examination is to test the expert's accuracy and learning and the weight which is to be given to his testimony (Egan v. Dry Dock R. Co., 12 A. D., 556). Some courts have refused to allow the reading of any part of standard treatises even on cross-examination on the ground that it is only an indirect method of getting the extract into evidence before the jury (Marshall v. Brown, 50 Mich., 148).

The general rule which governs the admissibility of standard treatises in evidence is that a party cannot prove material facts merely because certain authors have declared them to be so (People v. Millard, 53 Mich., 63). It is because of this rule that a party cannot read extracts or portions of standard works to the jury, making the testimony of experts necessary on trial (Foggett v. Fischer, 23 A. D., 407). The expert witness himself cannot read extracts from treatises to the jury, even though he is the author of the work (Mix v. Staples, 17 N. Y. Supp., 775). The witness, however, is allowed to name the authors upon which he relies for his opinion (People v. Goldenson, 76 Cal., 328; New York Law Journal, Oct. 2, '22).

NOTES OF IMPORTANT DECISIONS

DRIVER'S INVITATION TO CHILD TO RIDE HELD OUTSIDE SCOPE OF EMPLOYMENT.—In Zampella v. Fitzhenry. 117 Atl. 711, the New Jersey Court of Errors and Appeals holds that where a fifteen-year-old boy invited to ride by the driver, was thrown from defendant's motor truck and injured, defendant was not liable, notwithstanding the boy's infancy. as the act of the driver in inviting the boy to ride was not within the scope of his employment. We quote a portion of the opinion written by Minturn, J., as follows:

"Decisions might be multiplied in which, in the attempt to apply a satisfactory legal rule of liability, courts have misconceived this historical rationale upon which liability is predicated. No question or criticism can result where the servant does an act wantonly or maliciously as in Croft v. Allison (1821) 4 B. & A. 590, 6 E. C. L. 614, where a driver wantonly struck the horse of another, and the master was held not liable, the act being considered by Lord Kenyon entirely extraneous to the employment, and done to satisfy only the whim of the servant.

" 'When,' said Lord Kenyon, 'a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him.'

"The same principle was applied where a clerk was sent on an errand. Instead of returning as directed he drove about on business personal to himself, and ran over a child, and the master was exonerated. We have applied the same principle in this court within recent years in Evers v. Krouse, 70 N. J. Law, 653, 58 Atl. 181, 66 L. R. A. 592; Doran v. Thompson, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 355, 131 Am. St. Rep. 677; Missell v. Hayes, 86 N. J. Law, 348, 91 Atl. 322; Jennings v. Okin, 88 N. J. Law, 659, 97 Atl. 249; and Cronecker v. Hall, 92 N. J. Law, 450, 105 Atl. 213.

"In Jennings v. Okin, supra, we declared:

" 'From the moment [the deviation] was undertaken [by the servant] the relationship of principal and agent theretofore subsisting was severed.'

"It matters nothing in the legal equation whether the deviation which caused the damage consisted of a malicious act in no wise related to the master's business or of an independent act peculiarly due to the whim, or the individual capriciousness, of the servant in failing to attend to the business entrusted to him; the act in either event being disconnected from the master's work, and having no logical or legal relation thereto, the master upon any theory of agency or representation is exempt from responsibility. Nor is it of consequence, as in the case at bar, that the plaintiff occupies the status of an infant; for, the defendant being under no legal duty of responsibility, no right or liability can be predicated upon a nonexistent duty. An infant's exemption from contributory negligence can be invoked only where liability has been shown primarily to exist, as the logical sequence of the concurrent existence of a legal duty. Kingsley v. D., L. & W. R. Co., 81 N. J. Law, 540, 80 Atl. 327, 35 L. R. A. (N. S.) 338; United Zinc Co. v. Britt, 257 U. S. ——, 42 Sup. Ct. 299, 66 L. Ed. p. 349; Smith's Law of Negligence, 6. Such we conceive to be the rationale of the rule laid down by the Supreme Court in Karas v. Burns Bros., which was invoked by the learned trial court as furnishing the rule of law upon which the nonsuit was granted. The reasoning contained in the opinion in that case commends itself to us as a correct exposition of the legal rule of liability in this class of cases, and the essential similitude of fact in both cases requires the affirmance of the judgment under review."

RIGHT OF LIVING TO RECEIVE PROPERTY FROM THE DEAD, MAY BE TAXED.—That the right of transmission of property from the dead to the living and the right of the living to receive property from the dead are not inherent rights, but are privileges which may be taxed, is held in In re Fish's Estate, 189 N. W. 177, decided by the Supreme Court of Michigan.

"Irrespective of the policy involved and so far as the present question is concerned, both federal and state governments may collect revenue from the same source. It is not double taxation in the offensive sense. Neither the federal estate tax nor the state inheritance tax is a tax upon property, although the value of property is used to fix the measure of the tax in both instances. The right of transmission of property from the dead to the living, the right of the living to receive property from the dead,

are not inherent rights, but are privileges which may be taxed by a privilege tax. In Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, where the court had before it the inheritance tax feature of the War Revenue Act of June 13, 1898 (30 U. S. Stat. 464 et seq.) Mr. Justice White, who wrote the prevailing opinion, fully reviewed the history of death duties, and after such review said:

" 'Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested.'

"Applying the classification of death duties laid down in the opinion of Justice White, the federal estate tax may be regarded as a tax upon the privilege of transmission of property upon death, and the inheritance tax a tax upon the privilege of receiving property upon the death of the owner. In the view we take of the question, however, we do not regard the question of classification as important."

RANCHMAN NOT "PERSON ENGAGED CHIEFLY IN FARMING OR TILLAGE OF SOIL" WITHIN BANKRUPTCY ACT.—A ranchman, whose principal business was the raising of live stock for market, whose 1.400 acres of land, except 180 acres, was used for grazing, and of the 180 acres three-fourths was in alfalfa cut for winter feed, and the remainder in cultivated crops used on the ranch, was held, in In re Stubbs, 281 Fed. 568, not "a person engaged chiefly in farming or tillage of the soil," within the meaning of the Bankruptcy Act, sec. 4b.

"In analyzing the designated clause of the Bankruptcy Act here under discussion, courts have not been in complete harmony as to whether the word 'farming' and the phrase 'tillage of the soil' mean one and the same thing. The Circuit Court of Appeals, however, of the Eighth Circuit (our own), has spoken upon this subject, settling the controversy so far as this court is concerned. The court's language in the case of Hart-Parr Co. v. Barkley, 231 Fed. 913, at page 915, 146 C. C. A. 109, at page 111, is as follows:

" 'The words "farming or the tillage of the soil," as used in subdivision "b" of section 4, Act of July 1, 1898, express the same thought: that is, the word "farming' and the words 'tillage of the soil" mean the same things.'

"It would therefore seem to this court that this particular construction of the clause would place more of a restricted meaning upon the term 'farming,' by saying that it is synonymous with 'tillage of the soil,' than if the word 'farming' might be used in perhaps its broader sense.

"If we apply the phrase 'tillage of the soil' to the facts in the case at bar, it seems to this court that we must come far short of bringing Stubbs within the classification. His chief occupation was undoubtedly, under the facts as shown by the evidence, the raising of live stock for market. In the consummation of this endeavor lands under cultivation were used to produce hay to feed his live stock, and the remainder of the crops so raised were used either for feeding the animals or in in maintaining his ranching establishment, which included the maintenance of his family and the boarding of his hired help. Under these circumstances it would seem that there is no such 'tillage of the soil' as would seem to have been contemplated by the Bankruptcy Act, as the crops raised by cultivation were not marketed, but simply harvested for the purpose of carrying on his principal live stock business. If the circumstances were somewhat reversed, and a person were actually tilling a large proportion of his land, and using the balance for grazing, and in connection therewith running a proportionately small number of live stock, the situation would manifestly be changed.

"Another circumstance which is impelling to the court in arriving at this conclusion is that in this particular region there is a sharp distinction recognized between the occupation known as 'ranching' and that known as 'farming.' "

INSURANCE AGAINST "THEFT, ROBBERY OR PILFERAGE" AS COVERING SWINDLE.—Under a policy insuring against "theft, robbery or pilferage," the act of a swindler by which the owner of the insured property is swindled out of it through false pretenses or other fradulent trick or device with the preconceived intent and plan of the swindler not to pay for it, is held in Overland-Reno Co. v. International Indemnity Co., 208 Pac. 548, decided by the Supreme Court of Kansas, to be a species of theft for which the insurance company is liable. Chief Justice Johnston wrote the opinion, from which the following is quoted:

"The question in the case is whether the obtaining of the automobile in the way described constituted a larceny under the contract of insurance? It provided insurance against theft, robbery, or pilferage, excepting that committed by persons in the household service or employment of the assured. The plaintiff insists the term 'theft' as used is

equivalent to larceny, and that, as Dolson fraudulently gained possession of the automobile by a preconceived plan, with the intention of depriving the owner of its property, a theft was committed. As will be observed, the facts pleaded are quite similar to those involved in Hill & Howard v. North River Ins. Co., 111 Kan. ——, 207 Pac. 205. That decision, which was made since the judgment in this was rendered, is controlling here. It was decided that:

"' The prevailing rule is that any scheme, whether involving false pretenses or other fraudulent trick or device, whereby an owner of property is swindled out of it with the preconceived intent of the swindler not to pay for it, is classed as larceny and is punished accordingly.'

"In the syllabus of the case it was declared that:

"'Under a contract of insurance issued to protect a dealer in automobiles against "theft, robbery or pilferage," the act of a swindler who deprived the insured of an automobile by means of a preconceived plan which involved impersonation, misrepresentation and fraud was a species of "theft' for which the insurance company was liable.'"

LIABILITY OF DEFENDANT TO BOY WHO WENT ON ITS PREMISES AND TOOK GASOLINE.—In Flaherty v. Metro Stations, 196 N. Y. Supp. 2, it appeared that the defendant maintained a gasoline tank in connection with its business, 125 feet from the street in an open lot. There was a wooden platform in front of the tank. A 9-year-old boy, with other boys, went on the premises and took gasoline from a milk can standing on the platform, part of which was thrown on his clothing by the other boys, and became ignited from a bonfire, and he was injured. Held, that defendant was not liable, the Court saying:

"If we apply the reasoning of the opinion in the turntable case, there can be no recovery. I do not find that the principle decided in the turntable case has ever been overruled in this State, and I think the facts in this case fall within the rule laid down in that case, rather than within the principle announced in the case of Travell v. Bannerman. The holding in the case of Hall v. New York Telephone Co., 214 N. Y. 49, 108 N. E. 182, L. R. A. 1915E, 191, where the employees of the defendant left a bottle of denatured alcohol beside the road, which was taken by two boys to set a fire, and one was injured, and the case of Perry v. Rochester Lime Company, 219 N. Y. 60, 113 N. E. 529, L. R. A. 1917B, 1058, confirm that opinion.

"In the case of Hall v. International Railway Co., 184 App. Div. 925, 170 N. Y. Supp. 108, affirmed 227 N. Y. 619, 125 N. E. 919, no opinion was written, either at the Appellate Division or in the Court of Appeals. The facts in that case were as follows: A boy 6 years of age, with other boys, went to the yard of the defendant company, where trolley cars were kept immediately adjacent to a street. They played around there. It appeared that they had played there before, and had moved cars before. The power was on, and all that it was necessary to do to move a car was to change the position of the control lever. One of the boys started a car, and the plaintiff's intestate was killed. The only question submitted to the jury was whether or not the deceased and the other boys were on the defendant's private premises or were in a street. The jury found that in favor of the defendant. The case was tried before Mr. Justice Sears, and in the charge he said:

"'On a man's own property the only duty which he owes to a trespasser or to a bare licensee—and this young Edwin Hall was either a trespasser or a bare licensee—is not to intentionally injure that person, not to set traps, spring guns, or traps to catch the person intentionally, if he should come there, and not actively by any act of commission negligently to injure such person.'

"An exception was taken by the defendant, and the question was raised in this court and in the Court of Appeals. It is difficult to see why the holding in that case is not a direct authority in favor of the defendant in this case. There we have the fact of the boys having been in the habit of playing around the cars, and that they had moved cars before; so it cannot be said that the defendant could not anticipate that the boys would do just what they did do. Mr. Justice Sears, in the charge, narrows the question of the defendant's liability down to the same position taken by the Court in the turntable case. I think, in view of these decisions, that we are bound to hold that the plaintiff failed to make out a cause of action."

"Flubdub has studied both law and medicine."

"How does he stand?"

"Figure it out for yourself. The lawyers call him 'Doc' and the doctors call him 'Judge.'—Kansas City Journal.

There was a man out in Wisconsin who went to a revival meeting and was pressed to repent. He wavered for a time and finally arose and said: "Friends, I want to repent and tell how bad I have been, but I dasn't do it when the grand jury is in session."

"The Lord will forgive," the revivalist shouted.

"Probably He will," answered the sinner, "but He ain't on that grand jury.—Boston Transcript.

John: "Do you really believe that absence makes the heart grow fonder?"

Louise: "Well, you might try it for a month or two."—The American Legion Weekly.

MANSLAUGHTER AND ASSAULT BY CULPABLE NEGLIGENCE IN THE OPERATION OF MOTOR VEHICLES.

By Hon. W. Bruce Cobb, N. Y. City Magistrate.

Death and personal injury from the culpably negligent operation of motor vehicles presents a serious problem of law enforcement, due to the growing number of accidents arising out of the rapidly increasing use of automobiles.

The number of manslaughter and assault convictions from this source is almost negligible in proportion to the number of arrests. It is true that many such arrests are made on insufficient grounds and that the greater number of accidents occur because of the heedlessness of pedestrians. Nevertheless so few cases reach conviction that it would appear that either the law or law enforcement must be at fault.

It is safe to say that careless drivers consider themselves as virtually immune from conviction of either homicide or assault where death or serious injury results.

In view of this, it is believed that something like a survey of the present state of the law may be of value.

In New York there are several provisions of the Penal Law that are applicable. If the victim dies there are the homicide provisions. It is assumed that "culpable negligence" falls short of "an act imminently dangerous to others, and evincing a depraved mind regardless of human life,"[1] since such driving of a motor vehicle may warrant a conviction of murder.[2]

Section 1052, subdivision 3, provides for manslaughter in the second degree where the homicide is by the "culpable negligence of any person" not amounting to murder or to manslaughter in the first degree. Then in the same subdivision occurs the following: "Negligent use of machinery.—A person who, by any act of negligence or misconduct in a business or employment in which he is engaged, or in the use or management of any machinery, animals or property of any kind intrusted to his care or under his control, or by any unlawful, negligent or reckless act, not specified by or coming within the foregoing provisions of this article, or the provisions of some other statute, occasions the death of a human being, is guilty of manslaughter in the second degree."

This has been held to embody the common-law rules.[3] Ancient principles are applicable,[4] and a conviction of killing by automobile has been upheld under Section 1052.[5]

It would seem from the above language that an offense is made out if the act or omission be either (1) unlawful, (2) negligent or (3) reckless. If unlawful only, the question sometimes arises whether the law violated must be *malum in se* and not merely *malum prohibitum*.[6] As said in the McIver case: "It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person and is in itself dangerous, and death ensues, that the person violating the statute is guilty of manslaughter at least. * * *"

If the victim does not die, but is injured, the only adequate recourse is assault. First degree assault, like murder, involves far more than "culpable negligence," Sec. 240, Penal Law. Second degree assault must be either willful or intentional, according to all five subdivisions of Section 242 of the

(1) Penal Law, Sec. 1044, subdiv. 2.

(2) People v. Darragh, 141 App. Div., 408, 126 N. Y. Supp. 522, aff'd without opinion, 203 N. Y. 527. Compare People v. Sheriff, 1 Park, Criminal Cases, 659, 684.

(3) People v. Smith, 56 Misc., 1, 105 N. Y. Supp. 1082.

(4) People v. Darragh, supra, 414.

(5) People v. Scanlon, 132 App. Div., 528.

(6) See People v. Diamond, 95 Misc., 114, 160 N. Y. Supp., 603; People v. Harris, 74 Misc., 353, 134 Supp., 409; State v. McIver, 175 N. C., 761; People v. Barnes, 182 Mich., 179, 194; Maxon v. State, 187 N. W., Wis., 1922, 753, 755; Blakemore (Babbitt) on Motor Vehicles, 2d ed., 1917, secs. 1468 et seq.; Huddy on Automobiles 6th ed., 1922, sec. 758.

Penal Law. And "willfully" in a statute has been held to mean intentionally, purposely, designedly or wantonly.[7]

Plainly, this exceeds the requirements of "culpable negligence" as to which intent is not active, but presumptive or constructive if at all.[8]

In some States it has been held that facts that will support homicide by negligence will support assault.[9] But a comparison of cases will show many inconsistences, if not conflict, as to definition and necessity of intent.[10]

In this connection Blakemore (supra) says (sec. 1484): "At the least it is usually a matter of fortune, so far as human interposition is concerned, whether the victim of a motor vehicle accident is slain or simply bruised in the catastrophe. The law punishes in a degree measured by the *result* of the offense rather than by accurate tests of its moral aspect."

In New York, as we have seen, to constitute felonious assault intent must be made out to the extent of willfulness, purpose, design or wantonness.

In any case, those familiar with the subject in this State are well aware of the great difficulty, if not impossibility, in the past, of securing convictions for either felonious or simple assault in automobile cases. It was doubtless with this consideration in mind that the Legislature in 1921[11] amended Section 244 of the Penal Law so to read as follows:

Sec. 244. "A person who * * *

Operates or drives or directs or knowingly and willfully permits anyone subject to his commands to operate or drive any vehicle of any kind in a culpably negligent manner, whereby another suffers bodily injury,

Is guilty of assault in the third degree."

This provision rounds out the legislative scheme so that killing or wounding resulting from culpable negligence in driving a vehicle is, respectively, manslaughter or assault. Accomplices are punishable in manslaughter cases under the general rule of the Penal Law[12] in assault, as specifically provided in Section 244 itself.

It now becomes important to define "culpable negligence." We know that culpable means "blameworthy" or "deserving censure" or "moral blame" (see Webster and Century Dictionaries). It is equally easy to secure a dictionary definition of "negligence," but to stop here would ignore both statutory and judicial definition.

Subdivision 1 of Section 3 of the Penal Law reads: "Each of the terms 'neglect,' 'negligence,' 'negligent' and 'negligently' imports a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns."

Nothing is said of "culpable," but, as we shall hereafter see, that is included by implication.[13]

If this were all we might with fair success attempt to apply it to individual cases, but here judicial interpretation leads us farther afield. In People v. Welch[14] the Court of Appeals, in dealing with the phrase: "By an act, procurement or culpable negligence of any person," states: "It is scarcely necessary to cite authorities to show that the statute above quoted was simply declaratory of the rule of the common law that a killing of a human being by culpable negligence is manslaughter."

Therefore, judicial definitions of the term "culpable negligence" in criminal

7) Wass v. Stephens, 128 N. Y., 128; People v. Luft, 192 App. Div., 713; People v. Heller, 199 App. Div., 61.

(8) Blakemore, Babbitt, on Motor Vehicles, supra, sec. 1466; Berry on Automobiles, 3d ed., sec. 1568; also the following cases of killing by automobiles: Commonwealth v. Peach, 132 N. E., Mass., 1922, 351; State v. Bailey, 193 Pac., Kan., 1920, 354; State v. Long, 108 At., Del., 1919, 36, 38; Madding v. State, 177 S. W., Ark., 410, 413; contra, Dunville v. State, 123 N. E., 689, Ind., 1919.

(9) Blakemore, supra, sec. 1485; Huddy, supra, sec. 767, citing numerous authorities.

(10) See State v. Richardson, L. R. A., 1917D, 944, and note with cases on assault by automobile.

(11) Chap. 238, Laws of 1921.

(12) Sec. 2, People v. Scanlon, supra; compare Johnson v. Dowler, 225 N. Y., 40.

(13) People v. Buddensieck, infra.

(14) 141 N. Y., 266, 271.

cases is of importance even when such definitions are found in other jurisdictions, in so far as they may reflect the common-law rule.

In People v. Rosenheimer[15] we are reminded "that a distance separates the negligence which renders one civilly liable from that which establishes a criminal liability." See also Huddy (supra), Sec. 758.

Many authorities tell us that criminal negligence is gross negligence.[16] Compare 17 Corpus Juris 397. See also the following cases: People v. Barnes, [17] Jones v. C. R. &c., Ry.,[18] People v. Camberis,[19] People v. Adams,[20] Held v. Commonwealth.[21]

Thompson, the great authority on civil negligence, says there are no degrees of negligence.[22] The Supreme Court of the United States[23] says: "Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence'; but after all it means the absence of care that was necessary under the circumstances."

No modern writer on motor vehicles has given so much consideration to criminal negligence as Blakemore (supra), and he in turn pays special deference to Dr. Wharton.[24]

In further attempting to ascertain the common law definition of "culpable negligence" we find a flood of recent decisions in other States growing out of automobile casualities. These are nearly all cited by Huddy[25] and by Berry.[26] Berry thus summarizes manslaughter by motor vehicle: "An involuntary killing without design, in the commission of some unlawful act or in the improper performance of some lawful act, such as the operation of an automobile at an unlawful rate of speed, constitutes the offense of involuntary manslaughter, no intent to kill being required. One who willfully drives an automobile in a public street at a rate of speed or in a manner expressly forbidden by statute, and thereby causes the death of another, or one who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to cause the death of another, is guilty of criminal homicide."

According to Berry the accused must (a) violate ordinary standards of prudence to the extent of recklessness or else (b) violate some law or ordinance having direct relation to safety on the highway.[27]

In Webster's Dictionary "recklessness" is defined: (1) "inattentive to duty, careless, neglectful, indifferent," or (2) "rashly negligent, utterly careless or heedless."

Blakemore[28] enlarges on this and cites both judicial and dictionary definition. In State v. Rountree[29] it is declared that there must be "heedless indifference or thoughtless disregard. In State v. Goldstone[30] it is laid down that the negligence need not amount to foolhardiness. In Commonwealth v. Godshalk[31] the Court says: "Reckless driving upon the highway is not the exercise of reasonable or ordinary care in the use of it, and is a failure to perform a duty imposed by law." In Commonwealth v. Peach[32] it is said: "Nor was the judge required to instruct the jury * * * that in order to justify a conviction it was necessary to prove an intent consisting of an active state of mind amounting to reckless and wanton disregard for the lives of others."

(15) 209 N. Y., 115, 123.
(16) Blackmore, supra, sec. 1462; Berry, supra, sec. 1570, 954; Am. & Eng. Encyc. Law, 2d ed., 194, 196, 29 Cyc., 424, 21 id., 765, 766.
(17) 182 Mich., 179, 148 N. W., 400.
(18) 260 Fed. R., 929.
(19) 130 N. E., Ill., 1921, 712.
(20) 124 N. E., Ill., 1919, 575, 577.
(21) 208 S. W., Ky., 1921, 772, 774.
(22) Comm. on Law of Neg., sec 18.
(23) Milwaukee Ry. v. Arms, 91 U. S., 489, 495.
(24) Crim. Law, 10th ed.; Crim. Ev., 9th ed., and Homicide, 3d ed.
(25) Secs. 758, N. 97.
(26) Supra, secs. 1567, N. 69, and sec. 157.
(27) Compare T Ruling Case Law, sec. 48, and 13 id., sec. 163.
(28) Secs. 452 and 453.
(29) 106 S. E., 669, s. c.
(30) 175 N. W., 892, Minn., 1920.
(31) 76 Pa., Super. Ct. Reps., 1921, 500, 503.
(32) 132 N. E., 352, Mass., 1922.

In Comm. v. Horsfall[33] it is said: "Every traveler upon a highway is bound to exercise the care of the ordinarily prudent and cautious person under all circumstances."[34]

On the other hand, such cases as People v. Falkowitch[35] and People v. Barnes[36] appear to require recklessness in a high degree or wantonness, though a perusal of many of them shows confusion of language, and each case must be read in the light of its individual facts.

When we turn to older authorities we do not find the degree of recklessness to be other than the omission of ordinary care.

In 61 L. R. A., 277, are collected the older cases, which deal with negligent homicide through horse-drawn vehicles. In Rex v. Walker [37] it is said: "Such care and caution as to prevent, so far as it is within his power, any accident or injury therefrom." In Morris v. State:[38] "That which a man of ordinary prudence would have used in like circumstances." In Regina v. Jones:[39] "Bound to exercise reasonable care."

Belk v. Illinois[40] holds that one must "exercise reasonable care."

Nor do the older text writers seem to exact more. Wharton, upon whom Blakemore so largely relies, says:[41] "The care to be exercised is that which careful drivers are accustomed to use. Hence, a driver who fails to exercise such care and thereby injures another, is personally responsible."

So Russell on Crimes[42] says: "One must drive a vehicle with such care and caution as to prevent, so far as in his power, any injury to any person."

(33) 213 Mass., 232, 235, 100 N. E., 362.

(34) See also, Held v. Commonwealth, 208 S. W., 772, Ky., 1991, and State v. Long., Del., 108 At., 36, 38.

(35) 280 Ill., 321, 117 N. E., 398.

(36) 182 Mich., 179, 148 N. W., 400.

(37) 1 Car. & P., 320.

(38) 35 Tex. Cr. Rep., 313, 33 S. W., 539.

(39) 11 Cox C. C., 554.

(40) 125 Ill., 584, 589.

(41) Crim. Law, 11th ed., 1912, sec. 480.

(42) 7th Eng. ed., 1910, p. 794.

We now come to consider the New York authorities not already mentioned.

People v. Buddensieck[43] is probably the leading case on homicide through culpable negligence. It was an appeal from a conviction of manslaughter in the second degree. The Court of Appeals affirmed the opinion of the General Term, stating "that the case had been in both courts well and properly tried." The General Term opinion (p. 450) states:

"The subject to which the principal exception has been taken on this part of the case includes what the Court said to the jury concerning the definition of the phrase 'culpable negligence.' Care was taken to explain and illustrate the meaning of this phrase to the jury, and it was finally explained to them in a manner that certainly did no injustice to the defendant. It was finally held and stated that *'culpable negligence' is the omission to do something which a reasonable and prudent man would do, or the doing of something which such a man would not do under the circumstances surrounding each particular case.*

"Or it is the want of such care as a man of ordinary prudence would use under similar circumstances.

"And that was in accordance with the definition contained in subdivision 1 of Section 718 of the Penal Code (now P. L., Sec. 3, subdiv. 1), by which it has been enacted that 'each of the terms neglect, negligence, negligent and negligently imports a want of such attention to the nature or probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.'

"What the law designed to render criminal was such a careless act or omission on the part of the accused as will endanger the personal safety or life of another, and which by the exercise of reasonable attention and exertion would be avoided. As

(43) 4 N. Y. Crim. Rep., 280; s. c., 1. N. Y. State Rep., 436, aff'd 103 N. Y., 487.

much as that is a duty which every person owes to another. And it was upon the failure to observe the requirements of this rule that his (defendant's) liability to conviction by the jury was placed by the Court."

Here is no hint of recklessness, at least in the sense of utter negligence or wantonness. In the civil case of Noonan v. Luther[44] it is said: "We find no definition of culpable negligence which implies malice or recklessness, or anything further than a failure to exercise the care which a reasonable prudence would suggest."

None of the later decisions modify or criticise the rule of People v. Buddensieck.

In any case the act or omission forming the basis of homicide or assault must be the proximate cause of the death or injury. On this all authorities are agreed.[45]

Contributory negligence, however, does not relieve a defendant from his own want of care, and is therefore not a defense.[46]

Nor is lack of skill a defense. Just as the degree of care necessary is proportioned to the instrumentality and to existent conditions, so should be the degree of skill required. Lack of skill is in itself negligence, as no one should undertake to manage something beyond his capacity to operate safely.

While an automobile is not per se a dangerous instrument, it becomes so in the hands of one who is not skillful.[47]

In the case of People v. Polstein[48] the following charge by the trial justice, Judge Gibbs, of the Bronx County Court is approved: "If a man drives an automobile along the public highway and he has not had sufficient experience or is inattentive to what he is doing and he kills somebody it is no excuse before the law that he only started in driving the automobile that date, because, unless he was competent to drive that automobile he should not have driven it, and if in consequence of his inattention or inexperience or inability he kills somebody the law says he is guilty of manslaughter."[49]

A mistake in judgment is no defense if it springs from lack of skill or otherwise constitutes negligence. [50] The rule in cases of civil negligence is similar.[51]

A defective vehicle which the driver knew or should have known to be defective is no defense, but is itself evidence of negligence as inadequate brakes.[52]

Intoxication is no defense, but, on the contrary, tends to prove negligence.[53]

Efforts to avoid a collision following an act of negligence will not avail as a defense. If one is negligent in getting into a plight his best efforts to get out of it will not excuse him.[54]

Any cause beyond control, whether inevitable accident, misfortune or act of God, may be a defense.[55] So, sudden illness or freezing[56] But illness that is recurrent and to be anticipated may not.[57] So if one is deaf or has defective vision or is crippled so as to make it unsafe for him to drive, it is surely negligence for him to operate a motor thus handicapped.[58]

(44) 119 App. Div., 701.

(45) People v. Scanlon, supra; People v. Barnes, 182 Mich., 179, 196, 199; Campbell v. Comm., 82 Conn., 671, 74 At. 927; State v. Goldstone, 175 N. W., 892, 893, Minn., 1920; State v. Hanahan, 111 S. C., 58, 77, 96 S. E., 667; Luther v. State, 177 Ind., 619, 624, 21 Cyc., 765; Berry, supra, sec. 1569.

(46) Maxon v. State, 187 N. W., 753, 755, Wis., 1922; People v. Scanlon, supra; Blakemore, supra, sec. 1495; Huddy, supra, sec. 765.

(47) People v. Rosenheimer, supra, 121; City of Chicago v. Kluever, 257 Ill., 317, 324, cited with approval 280 id., 320; Commonwealth v. Horsfall, 213 Mass., 232, 235; State v. Long, Del., 108 At., 36, 38; State v. Watson, 216 Mo., 420, 115 S. W., 1011; Blakemore, supra, secs. 1464, 1502 and authorities cited; Berry, supra, sec. 157; Huddy, supra, sec. 36; see also Hendrick v. Maryland, 235 U. S., 600, 622 and Lampe v. Jacobsen, 46 Wash., 533, 90 Pac. Rep., 654.

(48) 184 App. Div., 260.

(49) See points on appeal, folios 36297.

(50) Wharton on Homicide, 3d ed., sec. 446; Thompson's Comm. on Neb., sec. 22; Commonwealth v. Tole, 25 Pa. Dist. Ct. Rep., 957.

(51) Reliable Auto Renting Co. v. Brooklyn City Ry., 192 N. Y. Supp., App. Term, 803, 804.

(52) Blakemore, supra, sec. 1483; Huddy, sec. 36.

(53) State v. Coulter, 204 S. W., Mo., 5; State v. Salmer, 181 Iowa, 280, 164 N. W., 620.

(54) Schultz v. State, 89 Neb., 130 N. W., 672; State v. Campbell, 82 Conn., 671, 74 At., 927; Comm. v. Tole, 25 Pa. Dist., 957; State v. Stentz, 33 Wash., 444, 450.

(55) Hoffman v. State, 209 S. W., Tex., 747, 748; Blackmore, sec. 1496.

(56) Id., 1501.

(57) Tifft v. State, 17 Ga. App., 663, 88 S. E., 41.

(58) See section 290-a N. Y. Motor Vehicle Law, providing for revocation of license for mental and physical disability.

In pleading acts of negligence it has been held as follows: "It was not, in our judgment, essential that the information should undertake to set out in detail in what such carelessness, recklessness and culpable negligence consisted, but the charge that he operated and propelled his automobile along a street carelessly, recklessly and with culpable negligence was in effect notifying the defendant that he was not using, operating or propelling his automobile in accordance with the law or the ordinances of the city regulating the use and operation of such machine.[59]

The basic question throughout this entire discussion to which an answer has been sought is: "What is culpable or criminal negligence in New York?" Due to the inexactness of the phrase and to the fact that what may impress one mind as culpable negligence may not so impress another, there has been resultant confusion.[60]

None the less, it seems that in other States convictions are secured far more often than in New York. It is submitted that a faithful adherence to our own Penal Law definition as interpreted by the Buddensieck case is a sound guide, and that, given an efficient gathering and presentation of evidence, it is adequate to punish and deter careless motor vehicle drivers who kill or maim their fellow beings.—*New York Law Journal.*

(59) State v. Watson, 216 Mo., 420, 115 S. W., 1011, followed; Schultz v. State, 89 Neb., 34; Madding v. State, 177 N. W., 410, 412.

(60) See Thompson Comm. on Law of Neg., sec. 1, on difficulties of defining negligence.

STRONGLY IMPRESSED

A stone carver was on the witness stand describing the way in which he had been assaulted by the defendant.

"He walked right into my yard and slammed me up against one of my tombstones," the witness said.

"Did he hurt you?" inquired the Court.

"Hurt me?" roared the witness. "Why, I've got 'Sacred to the Memory of' stamped all down my back."—Chicago Legal News.

NUISANCE—UNDERTAKING ESTABLISHMENT.

CUNNINGHAM v. MILLER.

189 N. W. 531.

Supreme Court of Wisconsin, July 8, 1922.

An undertaking establishment in a residential district, operating to materially decrease the market value of the residences, and creating dread of contagious diseases and discomfort from the sights, noises, and odor, *held* properly enjoined as a nuisance.

This is an action in equity brought to restrain the defendants from using certain property located in the residential section of the city of La Crosse as an undertaking establishment, upon the ground that such use constitutes a nuisance per se, and an unwarrantable invasion of the property rights of the residents in that vicinity.

It appears that for more than 20 years the defendant, Adelbert J. Miller, had conducted a general undertaking business located at 328 Main street, in the center of the business district of the city of La Crosse; he could not renew his lease, and purchased the property in question, known as No. 134 West Avenue South, which prior to that time had been used as a residence. The lot or plat of land on which the building stood had a frontage on West street of 115 feet, and extended backward to a public alley in the rear, a distance of 293 feet. The property was purchased in November, 1920. The defendants made certain repairs and improvements, not, however, making any structural changes in the house, and installed their undertaking business therein in January, 1921. The plaintiffs, who were adjacent property owners, residents in the immediate locality, commenced this action in March, 1921, seeking a perpetual injunction restraining the defendants from using the premises for an undertaking business, alleging: (1) That the district is an exclusive residence district; (2) that, because of funerals having been held from said place, and a consciousness that dead bodies may be or are on the Miller premises, and because of other reminders of mortality, the neighbors are discommoded and unhappy, and their feelings and spirits are depressed, life for them becomes less tolerable, and their bodily resistance to disease is lessened; (3) that odors from the disinfectants used can and do escape to nearby premises; (4) that there is danger of infection and spread of disease; and (5) that the neighborhood has become less

desirable as a residence district, and property values are accordingly depreciated.

The defendants deny the allegations of the complaint; allege that their business is conducted in a lawful and legitimate way, without injury to the plaintiffs or the general public; allege that funerals are held from the premises at infrequent intervals, and are but little attended; that the business is conducted in strict compliance with all the laws, rules and regulations of the State of Wisconsin and ordinances of the city of La Crosse relating thereto. The defendants further claim that the locality is not in fact a strictly residence district; that, through rapidly changing conditions, West avenue has become a commercial thoroughfare, has lost its character as a residence street, and is building up with amusement places, factories, stores, garages and other establishments, and in recent years several churches have been built along its course, and that another church is about to be built.

The Court made the following findings of fact:

"(1) That prior to November 10, 1920, each plaintiff owned and occupied as a residence, with his or her family, the respective tracts of land with the dwelling house thereon as alleged in the complaint, and still owns and occupies said property, which residences are all maintained in good condition, and large sums of money have been expended in improving and beautifying the buildings and grounds.

"(2) That on November 10, 1920, the defendant, Sophia Miller, purchased and still owns the land which the complaint alleges she purchased, including a valuable building thereon which was formerly used as a residence, on which property the defendant, Adelbert J. Miller, husband of Sophia Miller, has since January 25, 1921, maintained and conducted an undertaking establishment where a large number of bodies of the dead are embalmed and prepared for burial, where funerals are held in some cases, where dissections and autopsies are made in about 5 per cent of the cases handled, and where coffins and other materials are stored for use in said business.

"(3) That during said time said Adelbert J. Miller maintained a sign reading "Funeral Home" in a conspicuous place on the front of the building, kept a light burning all night in the premises, and conducted said business, including the bringing in and removal of the bodies of the dead at all hours, all of which was visible, and the noise incident to the work audible, from the street and from the residences of most of the plaintiffs, especially those who lived in close proximity thereto.

"(4) That said undertaking establishment has been conducted in as sanitary a manner as is usual in such business, but it is impossible to keep the same entirely free from flies, and that some offensive odors arising from the use of embalming fluids and from dissected bodies at times when autopsies are made escape therefrom to adjoining premises.

"(5) That defendant's premises are located on the west side and facing on West avenue, a street extending in a northerly and southerly direction. It adjoins the residence of the plaintiff, Elsie Gile Scott on the north and the residence of the plaintiff, Thomas E. Woolley, on the south. The defendants' building is within 60 feet of the Woolley residence, and a little nearer to the building used as a private garage and residence of the caretaker of the Scott premises. The block in which these buildings are located is bounded on the north by Main street, on the south by King street, and on the west by Eleventh street. The next street south of King street is Cass street. The portion of the city of La Crosse lying between Main street on the north and Cass street on the south and extending easterly from Eleventh street, a distance of five or six blocks, including the premises on the north side of Main street and certain premises south of Cass street, constitute an exclusive residence district, the most valuable in said city, in which many large and expensive residences and many smaller and less expensive ones now are and have been maintained for several years last past, some of the best of which residences are located on West avenue, including the Scott residence, and no business house is located within five blocks in any direction from the defendants' premises except a few scattered business houses to the north, the nearest of which are a drug store and a paint shop on the west side of West avenue in the north half of the block north of Main street. Residence property on the northeast corner of West avenue and King street has recently been purchased by the Christian Science Church, presumably for church purposes, but the evidence is conflicting and not very definite as to the use that is to be made thereof. West avenue is a street 80 feet in width. For many years it has been paved with macadam. It is extensively used for travel. Most of the travel consists of automobile driving for purposes of pleasure, but the travel includes that of some delivery trucks and a considerable number of funeral processions to cemeteries located in a northerly and an easterly direction from the defendants' premises.

"(6) That each of the plaintiffs has suffered damages by reason of the maintenance of said

undertaking establishment; that the effect of the continuance of said establishment at said place, as a natural and probable result, would be as follows: To materially decrease the market value of the residences of the plaintiffs; to render such residences materially less desirable as homes; to create in the plaintiffs and members of their families feelings of dread of contagious diseases, and feelings of discomfort and dissatisfaction from the sights and noises, and, in some instances, from the odors incident to said business, and, by the constant reminder of death, to depress the feelings of some of the plaintiffs and members of their families, especially the women, children and such persons who are ill or of a nervous temperament, such depressed feeling thereby impairing the comfort and happiness of all members of the family.

"(7) That said place is an unsuitable and improper place for the maintenance of said undertaking establishment, and its maintenance at said place is a nuisance."

—and concluded as a matter of law that plaintiffs were entitled to judgment abating the nuisance, and perpetually enjoining and restraining the defendants from the further continuance of an undertaking or embalming establishment or funeral home upon the premises. Judgment was entered accordingly, from which the defendants appeal.

Jesse E. Higbee, Oscar J. Swennes and John F. Doherty, all of La Crosse, for appellants.

Winter, Morris, Esch & Holmes, Geo. H. Gordon, and Law & Gordon, all of La Crosse, for respondents.

ROSENBERRY, J. (after stating the facts as above). The judgment is challenged upon two grounds: First, that the evidence does not support the findings of fact made by the Court; second, the findings do not support the judgment. We have carefully reviewed the record in this case in the light of the arguments presented by counsel, and are convinced that there is ample evidence to sustain the findings of the trial court. No useful purpose would be served by setting out the evidence in great detail. The essential facts are stated in the findings of the trial court, which have been set out at length in the statement of facts.

(1) The argument that the property is not located in a district occupied exclusively by residences is not persuasive. It appears from the evidence that in prior years certain wealthy residents of the city of La Crosse erected very elaborate homes in this vicinity, which, by reason of death and removal from the city, had been vacated by their original owners, and they are not readily salable for anything like the amount of their original cost. It is argued that this depreciation is due to the gradual encroachment of the business section of the city upon the residence district, and not to the alleged nuisance. There is no zoning ordinance in the city of La Crosse, or other law or regulation directly affecting the condition existing in reference to the property in question. We think the evidence ample to sustain the finding that the locus in quo is a residential district, nor do we think the fact that churches have been or are about to be erected in or near the vicinity materially alters the situation. The churches are not generally or usually associated with the business district of a city. Neither is the presence of a church such a disturbing factor in the life of a community as is the presence of an undertaking and embalming establishment. We make special reference to this feature for the reason that it has been greatly emphasized, and it is somewhat difficult to allocate the depreciation of property to the several causes which may have brought it about. We think, however, that the finding of the trial court that the presence of an undertaking and embalming establishment results in direct damage to the property rights of the plaintiffs is not against, but is supported by, the clear preponderance of the evidence.

(2) The question of whether or not the findings support the judgment raises a question of law which, so far as we are advised, has not heretofore been directly passed upon by this Court. Is the business of preparing dead bodies for burial, with the necessary incidents thereof, including the making of post mortems, the holding of funerals, and the removal of dead bodies to and from the premises, a nuisance when located and carried on in the residential section of a city? This question has been considered by the courts of other States, which have arrived at conclusions that are widely varying. No doubt in this, as in other cases involving nuisances, a rule cannot be laid down to govern all cases. Each case must depend largely upon the particular circumstances which characterize it. McCann v. Strang, 97 Wis. 551, 72 N. W. 1117. The injury complained of must be substantial and tangible, and the discomfort created thereby susceptible to the senses of ordinary people. Its character cannot be determined by its effect upon those of peculiarly sensitive feelings. Its actual effect must be judged by the degree of discomfort and injury produced upon the average person. Stadler v. Grieben, 61 Wis. 500, 21 N. W. 629; Pennoyer v.

Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728; Wahrer v. Aldrich, 161 Wis. 36, 152 N. W. 456.

(3) While the circumstances are not the same in any two cases, we think it is well established that a person must use his property with reference to the health, comfort, and reasonable enjoyment of public or private rights by others. In order to warrant the interference of a court of equity, the acts complained of must be such as are offensive to the physical sense, and by reason of such offensiveness make life uncomfortable. As has been said, the result is not to be measured by its effect upon those of extreme sensitiveness. On the other hand, it is not to be measured by its effect upon those who have been accustomed to endure acts such as are complained of without annoyance. It appears in this case that the maintenance of the undertaking and embalming business has operated to materially decrease the market value of the residences owned by the plaintiffs, has rendered such residences materially less desirable as homes, created in the plaintiffs and members of their families feelings of dread of contagious diseases, and feelings of discomfort and dissatisfaction from the sights, noises and odors incident to the business, and by the constant reminder of death the feelings of some of the plaintiffs and members of their families have been depressed to an extent which appreciably impairs their comfort and happiness.

The great weight of authorities in this country is to the effect that the establishment and operation of an undertaking and embalming business in a residential section under such circumstances constitutes a nuisance. Saier v. Joy, 198 Mich. 295, 164 N. W. 507, L. R. A. 1918A, 825; Densmore v. Evergreen Camp, Woodmen of the World, 61 Wash. 230, 112 Pac. 255, 31 L. R. A. (N. S.) 608, Ann. Cas. 1912B, 1206; Stotler v. Rochelle, 83 Kan. 86, 109 Pac. 788, 29 L. R. A. (N. S.) 49; Barnes v. Hathorn, 54 Me. 124; Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201; Barth v. Christian psychopathic Hospital Ass'n, 196 Mich. 642, 163 N. W. 62; Middlestadt v. Waupaca Starch & Potato Co., 93 Wis. 1, 66 N. W. 713. While there are cases which hold the contrary doctrine, we think the rule as stated is the sounder and better rule. As was said by the Supreme Court of the State of Michigan:

"It requires no deep research in psychology to reach the conclusion that a constant reminder of death has a depressing influence upon the normal person."

We think it is equally clear that maintenance of an undertaking and embalming establishment in a residential section must inevitably operate to decrease substantially property values, destroy the comfort and happiness of people residing in the immediate vicinity, and is an unwarrantable invasion of the rights of others.

Judgment affirmed.

NOTE—*Undertaking Establishment as a Nuisance.*—In the case of Densmore v. Evergreen Camp, No. 147, 61 Wash. 230, 112 Pac. 255, 31 L. R. A. (N. S.) 608, it is held that the maintenance of an undertaking establishment in a residence part of a city within a few feet of neighboring residences may be enjoined by their owners as a nuisance, in view of the probable interference with the comfortable enjoyment of their property by the depressing efforts of the reminder of mortality and the escape of noxious odors and gases from chemicals used in the business, and that it is immaterial that the owner of the business intends to reside in the upper stories of the building.

In Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490. an injunction was sought against an undertaking establishment on the lot adjoining the one on which the plaintiff resided. It appeared that no noxious vapors or germs of disease were noticed as a result of the business, and that the main feature of offensiveness resulted from the plaintiff's sensitive nature and repugnance to anything pertaining to death. In meeting the contention that the business was a nuisance per se, the Court said that the injury must be physical, as distinguished from purely imaginative, and that before a trade or business can be declared to be a nuisance per se, it must be made to appear that it necessarily works injury, discomfort, or annoyance to the property or persons of citizens generally who may be so circumstanced as to come within its influence. The Court held that the business is not a nuisance per se and that the evidence failed to show that it was one in fact.

In Saier v. Joy, Michigan, 164 N. W. 507, L. R. A. 1918A, 825, it is held that the opening of a morgue and undertaking establishment in a residence district, to the depreciation of the value of neighboring property, may be enjoined as a nuisance.

Even in the absence of any prohibitive ordinance, an undertaker may be prevented from establishing his business among residences where such business has not theretofore been conducted. Osborn v. Shreveport, 143 La. 932, 79 So. 542, 3 A. L. R. 955.

See also in this connection Koebler v. Pennewell, 75 Ohio St. 278, 79 N. E. 471.

A SMALL POINT

His Wife: "So your client was acquitted of murder. On what grounds?"

Lawyer: "Insanity. We proved that his father had spent five years in an asylum."

His Wife: "But he didn't, did he?"

Lawyer: "Yes. He was a doctor there, but we had not time to bring that fact out."—Boston Transcript.

WEEKLY DIGEST.

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1. **Automobiles** — License.—Automobile number plates issued to a licensed dealer under St. 1909, c. 534, § 4, as amended by St. 1915, c. 16, § 2, could not lawfully be loaned by him for use on an automobile not owned or controlled by him, and his license did not protect one owning and operating the automobile with such number plates attached. —McDonald v. Dundon, Mass., 136 N. E. 264.

2.——License.—Even though an automobile owned or controlled by defendant was legally registered in his name, its operation on the highway was illegal under St. 1909, c. 534, §§ 5, 9, where the only number plates attached were those issued to a former owner.—Pierce v. Hutchinson, Mass., 136 N. E. 261.

3. **Banks and Banking**—Depositors.—While in some aspects the depositors of the savings department of a trust company are cestuis que trust and the trust company is trustee, in other aspects the relation is that of debtor and creditor.—Petitions of Allen, Mass., 136 N. E. 269.

4.——Lien.—The lien on funds in a bank belonging to a deceased depositor survives his death, and where the funds are deposited in his wife's name the lien may be determined in an action in which his administrator may be made a party, in order to foreclose his estate from questioning the judgment.—Traders' Nat. Bank v. Amsden, N. Y., 195 N. Y. S. 291.

5.——Mortgage.—Where plaintiff sold machinery to a mill and elevator company and mailed the bill of lading and three notes to defendant bank, with instructions that the notes were to be secured by a first mortgage on the mill building and machinery, and for defendant's attorney to prepare the mortgage, but the cashier drew the mortgage himself, and it was so defective that it was void against subsequent incumbrancers, the bank cannot escape liability on the ground of ultra vires; the transaction being a common one in the banking business.—Wolf Co. v. State Bank Commissioner, Col., 208 Pac. 462.

6.——War Conditions.—Where, on December 13, 1916, plaintiff gave defendant $2,300 for the purchase of 20,000 kronen to be placed on deposit in Hungary, and, due to war conditions, delivery in Hungary was not made until December 19, 1919, at which time 20,000 kronen were worth only $160, the jury having found that plaintiff failed to exercise reasonable diligence in making deposit, plaintiff was liable for the full amount of money paid by plaintiff at the time of the purchase.—Temmer v. Zimmermann, N. Y., 195 N. Y. S. 412.

7. **Bills and Notes**—Interest.—Where a note is payable with interest, and no rate is specified, the legal rate of interest applies.—Chelsea Exch. Bank v. Roulstone, N. Y., 195 N. Y. S. 419.

8.——Offer to Pay.—In bank's action against a corporation on the corporation's $3,000 note, evidence that defendant's former president undertook to pay his individual note of $2,000 to the bank with the corporation's $2,000 check on the corporation's account with the bank, which facts he knew, did not support defendant's plea of payment in whole or in part; as "voluntary payment," set up by the plea, involves, among other things, the debtor's intention to pay the debt, in whole or in part and a cross-demand, no matter how clearly established, is not "payment," but can become so only by agreement of the parties.—Dixie Industrial Co. v. Bank of Wetumpka, Ala., 92 So. 786.

9.——Time.—The proceedings in an action to recover from the drawer of a check, by an indorsee who acquired the check from the payee, 24 days after it was issued, examined, and held, the time which elapsed between the issuing of the check and its negotiation, was not so unreasonable as to deprive the holder of the privileges of a holder in due course.—Anderson v. Elem, Kan., 208 Pac. 573.

10. **Carriers of Baggage**—Liable on Acceptance. —Where a terminal company had lost plaintiff's trunk before plaintiff appeared to check it to her destination, the fact that plaintiff intended to use a pass issued to another in fraud of the rights of the carriers did not relieve the terminal company from liability for the loss of the trunk.—Birmingham Terminal Co. v. Thomas, Ala., 92 So. 803.

11. **Carriers of Freight**—Rates.—In an action to recover excess freight charges on shipments of yellow pine, subjected to a 5-cent rate as "lumber," plaintiff claiming a 4-cent rate as on "timber," an instruction that, when a rate is promulgated, and an ambiguous term used, the carrier must be held to have used the term as understood by the public and not in a technical sense, as understood by the carriers, so that, in determining whether the pine should be classified as timber or lumber, the jury should determine from the evidence how the pine would be classified by the public or lumber trade generally, was too narrow, in that it ignored a construction of the terms as evidenced by a practice of the carrier and shippers for 15 years.—T. R. Miller Mill Co. v. Louisville & N. R. Co., Ala., 82 So. 797.

12. **Carriers of Goods**—Interstate.—The provision of Interstate Commerce Act. § 20, as amended (Comp. St. § 8604a), imposing on a carrier liability for the full loss or damage to interstate shipments, or shipments "to an adjacent foreign country." notwithstanding any limitation in the bill of lading, held not to apply to a shipment to a foreign country not adjacent.—Dexter & Carpenter v. Davis, U. S. C. C. A., 281 Fed. 385.

13. **Carriers of Passengers**—Certificates.—Pub. Acts 1921, c. 77, regulating the issuance of certificates to jitney owners, is not invalid as prohibiting a lawful calling, because it authorizes the Public Utilities Commission to grant certificates to some jitney owners and refuse the same to others, the power to decide on evidence an ultimate fact in accord with general rules specified by the Legislature being a necessary power to enable an administrative body to conduct public business.—State v. Darazzo, Conn., 118 Atl., 81.

14.——Charters.—Acts Ky. March 3 and April 9, 1886 (Loc. & Priv. Acts 1885-86, cc. 141, 569), extending the charters of Louisville street railway companies for a term of 99 years, with authority to maintain and operate street car lines on routes granted in the charter or by the city council, and authorizing the council to grant the companies the authority to build and operate such lines and routes on such terms as might be agreed on between the company and the general council, did not extend existing contracts between the city and the companies establishing a five-cent fare for the full period of the extended charter.—City of Louisville v. Louisville Ry. Co., U. S. C. C. A., 281 Fed. 353.

15.——False Representations.—In an action for damages alleged to have been caused by a false representation to plaintiff that a certain train would arrive, inducing him to spend a night in defendant's unlighted, unheated waiting room, and

subjecting him to annoyance by drunken persons therein, evidence held to present a question for the jury as to punitive damages.—Edwards v. Seaboard Air Line Ry. Co., S. C., 113 S. E. 134.

16.——Instructions.—In an action for injuries to a street car passenger, while endeavoring to alight from the car of the street railway company, where the Court instructed the jury that the defendant street railway company owed to its passengers the duty to exercise the utmost care and diligence to afford them a reasonable opportunity to alight in safety from its cars, to stop such cars a reasonable length of time for the purpose, and to ascertain that its passengers who were attempting to alight had alighted from said cars before the same were again started, held, the instruction correctly stated the law defining the duty of the defendant company to its passengers.—Muskogee Electric Traction Co. v. Elsing, Okla., 208 Pac., 264.

17.——Liability.—When the carrier, a street railway company, has carried its passenger in safety and discharged her in safety on the street, and the danger was not there at that time, the carrier has discharged its obligation to the passenger, and a charge to the jury which may fairly be construed to authorize a recovery for an injury received from an independent source, subsequent to the discharge of the passenger in a place of safety, is erroneous and prejudicial.—Mahoning & S. Ry. & Light Co. v. Leedy, Ohio, 136 N. E. 198.

18. **Constitutional Law**—Jury.—The federal Constitution does not expressly require jury trials in state courts, and the provisions of the state Constitution (Declaration of Rights, § 3) that "The right of trial by jury shall be secured to all, and remain inviolate forever," does not forbid statutory provisions that in appellate proceedings the appellate court shall not indulge presumptions as to the correctness of the verdict of the jury in the trial court, since, where general appellate jurisdiction is given by the Constitution, the appellate court in appropriate proceedings duly taken may review the merits of the cause, including a consideration of the evidence and a determination of its probate force under the issues made by the pleadings, as well as review the questions of law presented by the record.—State v. Aetna Casualty & Surety Co., Fla., 92 So. 871.

19.——Rebuilding a Dam.—The enjoining of the rebuilding and maintenance of a dam which had been built before the statute was enacted, but which had been washed out and not maintained for a number of years after the enactment of the statute, is not a violation of the constitutional rights of the defendant.—Martin v. Lown, Kan., 208 Pac., 565.

20.——Standard Time.—Daylight Saving Act (Laws 1921, c. 70, as amended by Laws 1921, c. 260) did not delegate to municipal bodies legislative power to establish standard time for their territory, but fixed a standard time which the municipalities and villages were thereby authorized to adopt.—Briegel v. Day, N. Y., 195 N. Y. S., 295.

21. **Contracts**—Bilateral.—A contract in the form of a letter written the M. Company by defendant and containing defendant's agreement to take 1,500,000 feet of logs at $42 (shown by the evidence to mean $42 a thousand) within 18 months, and signed by the M. Company, was not unilateral or wanting in mutuality, as the obligation to deliver the logs might be implied from the intention of the parties and the consideration on which the expressed obligation to purchase was based, and the M. Company's intention to be bound was clear from the fact that it accepted and signed the offer, especially where an assignee partly performed the contract.—Ross v. Morrimac Veneer Co., Miss., 92 So. 823.

22. **Corporations**—Authority.—The authority of a railway company under its charter to acquire real estate and its right to operate oil and gas wells upon its right of way could not be questioned by its grantor, but only by the sovereign.—Nelson v. Texas & P. Ry. Co., La., 92 So. 754.

23.——Contracts.—There was no implied contract by a corporation to pay one of its directors for assisting it financially by lending it money or collateral, or indorsing its notes, because of the fact that he lent it his property and credit, or because his services were valuable, and no presumption arose that the assistance was rendered for reward; they not being of the character usually and commonly the subject of hire.—Sears v. Corr Mfg. Co., Mass., 136 N. E., 266.

24.——Stockholders.—Under Stock Corporation Law, § 16, providing that a corporation by consent of two-thirds of its stockholders may convey its property rights, franchises, etc., and Section 17, providing that one-third or less of the stockholders not consenting to such sale and conveyance may apply to a court for an appraisal of the value of their stock and compel payment to them by the corporation of the value thereof, where a corporation, organized to carry on manufacturing milk into butter, cheese and other milk products, had power to lease its properties, a lease of its property for a year to another corporation having a like purpose did not entitle minority stockholders to an appraisal of the stock and payment to them of the value of their stock so determined.—In re Knaisch, N. Y., 195 N. Y. S. 323.

25.——Stock Issue.—Under Const. 1898, Art. 266, prohibiting the issuance of corporate stock except for labor done or money or property actually received, etc, and Code Prac. Art. 28, relative to the grounds of personal actions, one receiving stock for services not worth its par value was not liable for the par value, in the absence of fraud or the obtaining of any credit, etc., in consequence of the issuance of the stock.—Walmsley v. Brothers, La., 92 So. 766.

26.——Trustee.—A director whose interest in a matter under consideration is adverse to the corporation he represents is disqualified to vote thereon, and under Civ. Code, § 2230, providing that a trustee may not participate in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest adverse to that of his beneficiary, directors of a corporation are trustees thereof, and a director who is an attorney may not vote on a resolution authorizing execution of a note and mortgage in settlement of a client's claim against the corporation, and his presence is not effective to make up a quorum for such action.—North Confidence Mining & Development Co. v. Fitch, Calif., 208 Pac. 328.

27. **Covenants**—Restrictions.—In a suit to enjoin the owner of an adjoining lot from constructing stores because of restrictions shown by circulars and maps distributed at the sale of lots, defendant's contention that, under clause in plaintiff's deed providing that the covenants and restrictions therein might be "altered or modified," the common grantor could convey to defendant without restrictions, is untenable, for "alteration" and "modification" are not synonymous with "substitution."—Kempner v. Simon, N. Y., 195 N. Y. S. 333.

28. **Damages**—Physician as Witness.—The physical examination before trial of plaintiff in a personal injury case, by a physician to be appointed by the Court, which Code Civ. Proc. § 873, provides shall be ordered on application by defendant and showing by him of ignorance of the nature and extent of the injuries, being in behalf and at the expense of defendant, it is to be expected that the results will be communicated to defendant's attorney, but the physician cannot be required to file a report, nor to make a report to plaintiff, nor for that matter to defendant, but he is simply to testify on the trial as other witnesses to the facts ascertained by him from the examination.—Kelman v. Union Ry. Co., N. Y., 195 N. Y. S. 313.

29. **Executors and Administrators**—Claim.—The granting of a petition for an extension, under Gen. Laws, c. 197, § 9, of the time to sue executors by a creditor of the deceased, has no effect on the validity of the claim on which the action is brought.—Hellier v. Loring, Mass., 136 N. E., 248.

30. Real Estate—As real estate could have been sold, under Rev. Laws, c. 140, § 2, for the purpose of satisfying a widow's allowance, the executrix might be authorized to use proceeds of a sale in her hands for that purpose, though the real estate was not ordered sold for that purpose.—Burns v. Hovey, Mass., 136 N. E. 246.

31. **Frauds, Statute of**—Written Contracts.—Where the statute requires a contract to be in writing, the writing is constitutive; but where it requires but a note or memorandum, it is merely evidential.—Duncan v. Wohl, South & Co., N. Y., 195 N. Y. S. 381.

32. **Indictment and Information**—Election.—Under the National Prohibition Act, the offense of unlawful possession of intoxicating liquor is a distinct offense from that of transportation of such liquor, so that the district attorney cannot be compelled to elect as to whether he will rely for conviction on a count of the indictment charging transportation or on that charging unlawful possession.—Massey v. United States, U. S. C. C. A., 281 Fed. 293.

33. **Injunction**—Attorney's Fee.—When on final hearing a bill is dismissed and an injunction pendente lite granted the complainant is dissolved in a suit in equity, where the only relief sought by the complainant is an injunction, and the dissolution of the temporary injunction involves also the dismissal of the bill, the defendant is entitled to attorney's fees incurred in defending the whole case.—Bank of Philadelphia v. Posey, Miss., 92 So. 840.

34.——Bond.—Where plaintiff upon dissolution of an injunction restraining a sale of real estate would be immediately entitled to another injunction, it will not be dissolved because the amount of the bond fixed by the clerk, under Act No. 43 of 1882, §§ 4, 6, was insufficient, especially where defendant did not invoke Act No. 112 of 1916, and serve notice that the bond was insufficient.—Boone v. Boone, La., 92 So. 861.

35.——Injury.—The essential features of an "irreparable injury" are: (1) That the injury is an act which is a serious change of, or is destructive to, the property it affects either physically or in the character in which it has been held and enjoyed. (2) That the property must have some peculiar quality or use such that its precuniary value, as estimated by a jury, will not fairly recompense the owner for the loss of it.—Moss v. Jourdan, Miss., 92 So. 689.

36. **Insurance**—Cancellation.—Mere forbearance by insurer to cancel policy upon discovery that iron-safe clause was not in policy, without a definite agreement by it not to cancel, would not be a sufficient consideration for modification of the policy to include an iron-safe clause.—Bassi v. Springfield Fire & Marine Ins. Co., Calif., 208 Pac. 154

37.——Damages.—In an action by a tenant farmer upon an accident insurance policy to recover payments for total disability under the policy, on evidence that the fracture of plaintiff's leg resulted in a permanent injury which materially interfered with his farming, the question of his total disability held for the jury.—Berry v. United Life & Accident Ins. Co., S. C., 113 S. E. 141.

38.——Form.—Sections 9410 to 9421, Gen. Code (99 O. L. 139-174), authorize the issuance of life insurance policies in form other than the standard forms prescribed in Sections 9412 to 9417, General Code.—Landis v. Metropolitan Life Ins. Co., Ohio, 136 N. E. 193.

39.——Military Service.—Where the insured "engaged in military service" and there is a provision in the policy exempting the insurer from liability under a clause in the policy providing: "This policy is unrestricted as to travel, residence or occupation of the insured," except that if at any time the insured shall engage in military or naval service in time of war (the militia not in active service excepted) he shall secure the company's written consent and pay the extra premium therefor, as from time to time fixed by the company. In the event of non-compliance with this requirement the company's liability hereon in case of death of the insured while in such service will be limited to an amount equal to the legal reserve hereon at date of death"; and it appears from the record the insured died within two days of bronchopneumonia after landing at Brest, France, and it was stipulated by the parties to the action that the evidence does not show that the insured died as the result of his military service nor that his military service contributed to his death; and that broncho-pneumonia is a disease that is contracted as well out of the army as in it, held that the insurer was not exempted from liability.—Barnett v. Merchants' Life Ins. Co., Okla., 208 Pac. 271.

40.——Warranty.—Though there may be a duty for the insured under an accident policy to notify the insurer of his change of occupation from a non-hazardous occupation to that of officer of the army in field service during time of war, his failure to give such notice was not a breach of warranty, where he correctly stated his occupation at the time the policy was issued, and he was not thereafter asked by the company to make any statement as to his occupation.—Gillies v. Preferred Acc. Ins. Co., N. Y., 195 N. Y. S. 395.

41. **International Law**—State Recognition.—A new State does not require recognition of other States to confirm its internal sovereignty. So long as it confines its actions to its citizens and to the limits of its own territory, it may dispense with such recognition; but, if it desires to enter the society of nations recognition becomes necessary to entitle it to participation.—Wulfsohn v. Russian Socialist Fed. Sov. Republic, N. Y., 195 N. Y. S. 472.

42. **Intoxicating Liquors**—Search and Seizure.—Agents of the Federal Prohibition Commissioner, having lawfully entered a place of business open to the public, and being made conscious through sight and smell of the possession of liquor, and noting conditions evidencing that the liquors were kept in violation of the National Prohibition Act, had the legal right to search and seize them without first securing a search warrant.—O'Connor v. United States, U. S. D. C., 281 Fed. 396.

43. **Licenses**—Blue Sky.—Where an individual, wtihout solicitation or influence of stock sales inducements, purchases an undivided interest in an undeveloped oil lease, with the expectation of becoming one of its promoters, the assignor of such interest under the circumstances shown here is not within the purview and intent of the regulations and penalties of the Blue Sky Law.—Hornaday v. State, Okla., 208 Pac. 228.

44.—Blue Sky Defined.—A written contract, undertaking to sell a patent right, is not within the operation of that part of the "blue sky law" requiring a permit from the bank commissioner for the sale of speculative securities, "securities" being defined as "stock certificates, shares, bonds, debentures, certificates of participation, contracts, contracts or bonds for the sale and conveyance of land on deferred payments or installment plan, or other instruments in the nature thereof by whatsoever name known and called."—Schomoyer v. Van Hosen, Kan., 208 Pac. 554.

45.——Officer.—St. 1914, c. 795, § 4, authorizing the fire prevention commissioner to delegate the granting of licenses to keep and store gasoline to any designated "officer," authorized such delegation to the mayor and board of street commissioners of Boston, in view of Gen. Laws, c. 4, § 6, par. 4, relative to the construction of statutes.—Foss v. Wexler, Mass., 136 N. E. 243.

46. **Livery Stable and Garage Keepers**—License.—The consent of neighboring property owners to the building of a garage, which was given without consideration, may be revoked at any time before being acted upon.—People v. Walsh, N. Y., 195 N. Y. S. 264.

47. **Master and Servant**—Agency.—Driver of defendant's delivery truck, after having made the last delivery for the day drove the truck to his home and used it in moving furniture for himself, and subsequently when driving the truck to the garage of the employer, ran into and injured plaintiff. Held, that driver was not acting within the scope of his employment, and that the employer was not liable.—Cannon v. Goodyear Tire & Rubber Co., Utah, 208 Pac. 519.

48.——Employee.—Where an employe, whose duty required him to be on the streets in the exercise of his employer's business, while so engaged, was injured by the explosion of a bomb in a street, he was entitled to compensation under the Workmen's Compensation Law.—Roberts v. J. F. Newcomb & Co., N. Y., 195 N. Y. S. 405.

49.——Employer.—Where a trucking company employed by a building contractor to remove some excavated material hired trucks and drivers at a stated price per day from a truck-renting company, and both the building contractor and the trucking company gave truck drivers directions as to the routes, and employed men to follow them up and see that drivers performed their work, the jury was authorized to find that trucking company was liable for driver's negligence.—Wagner v. Motor Truck Renting Corporation, N. Y., 136 N. E. 229.

50.——Willful Neglect.—Where an employee, bitten by a dog, refused to take the Pasteur treatment after he was told that an examination showed that the dog had rabies, on the ground that he did not believe it, could not afford the expense and was afraid of the treatment, he was not guilty of willful neglect, defeating recovery under the Compensation Act, for death resulting from hydrophobia.—Chandler v. Industrial Commission, Utah, 208 Pac. 499.

51.——Within Scope of Employment.—Where an employee, a deliveryman, who was on his way from his residence to employer's garage during working hours to get the delivery car which he used, was bit by a dog and died from hydrophobia, the injury arose out of the employment and was compensable, as the employee was actually on an errand for his employer and not merely going to work.—Chandler v. Industrial Commission, Utah, 208 Pac. 499.

52.—Without Scope of Employment.—Death of a mine superintendent shot by bandits at midnight when he entered a store to purchase a cigar during the progress of a holdup, held not compensable as an accidental "injury arising out of or in the course of employment" defined by Comp. Laws Utah 1917, § 3112, as amended by Laws Utah 1921, c. 67, § 1, to include an injury caused by the willful act of a third person directed against an employee because of his employment, the shooting having no casual connection with his employment, which required him to be ready at all times to answer calls to duty.—Westerdahl v. State Ins. Fund, Utah, 208 Pac. 494.

53. **Municipal Corporations** — Franchise.—The City of New York has no power to establish or operate bus lines in its streets, except by the grant of a franchise as pointed out by statute.—Huff v. City of New York, N. Y., 195 N. Y. S. 257.

54.——Landlord Liable.—Where the roof of a building abutting on a street pitched toward the street, and the eaves gutters were out of repair, so that when it rained water was discharged upon the sidewalk, and an injury resulted by reason of a fall on the ice, the liability of the landlord as the creator of the nuisance would not be terminated by sale of the property.—Bixby v. Thurber, N. H., 118 Atl. 99.

55.——Pedestrians.—Notwithstanding the view may be obstructed, there is no positive duty upon pedestrians about to cross busy thoroughfares to stop, look and listen at a crossing which is the regular stopping place for street cars, nor is this duty imposed while pedestrians are proceeding across the street in front of cars at their regular stopping places, especially where they may rely upon automobiles not being driven within six feet alongside the cars, as provided by Motor Vehicle Act, St. 1919, p. 217, § 20, subd. O.—Reaugh v. Cudahy Packing Co., Calif., 208 Pac. 125.

56.——Property Owner Liable.—Where an abutting property owner was negligent in maintaining a cesspool under the street over which a tree was growing, and the tree was blown down upon a traveler in the street during an extraordinary storm, the character of the storm does not relieve defendant from liability where the evidence showed that notwithstanding the violence of the wind the tree would not have been blown down on the traveler except for the negligence of defendant.—Smith v. Bonner, Mont., 208 Pac. 603.

57. **Negligence**—Fire Truck—In an action by a city for damage to fire truck in collision with street car, negligence of driver of truck could not be imputed to the city.—Columbus R. Co. v. City of Columbus, Ga., 113 S. E. 243.

58. **Principal and Agent**—Extent of Agency.—Where real estate is placed in the hands of an agent with instructions in general terms to sell, the agent is not thereby authorized to enter into a contract of sale binding the owner, since the contract of agency is to be strictly construed.—Crumley v. Shelton, Col., 208 Pac. 460.

59. **Principal and Surety**—Fraud.—In general, and except where such imputation would amount to a fraud on the part of both debtor and creditor, the debtor may always impute the payments as he pleases; and cannot be controlled therein by a surety.—Grand Lodge, B. Knights of America v. Murphy Const. Co., La., 92 So. 757.

60. **Sales**—Appeal.—Under the pleadings and the agreed statement of facts, the judgment of the Court, sitting by consent without the intervention of a jury, in favor of the plaintiff, was authorized, and the overruling of the defendant's motion for a new trial was not error.—Friedlander Bros. v. Fuld & Hatch Knitting Co., Ga., 113 S. E. 100.

61.——Delivery.—A shortage of railroad freight cars did not justify or excuse the seller's failure to make delivery of rice under a contract of sale f. o. b. cars at point of shipment, it not constituting inevitable accident or irresistible force within Civ. Code, Art. 2120, and not justifying the application of the doctrine of commercial frustration.—C. F. Bonsor & Co. v. Simon Rice Milling Co., La., 92 So. 711.

62.——Resale.—Where a buyer of a car of grease stearine is entitled to rescind the sale of same because of a breach of warranty in the quality thereof, and the seller refuses to accept a return of such product and repay the purchase price, all of which had been paid upon delivery of the bill of lading, and the buyer exercises due diligence in endeavoring to procure offers therefor, soliciting bids from large local consumers as well as from brokers dealing in such product, and informs the seller of the best bid made, and requests a bid from such seller, to which request there is no response, and the buyer thereafter buys it himself at a price in excess of that offered by any other, and thereafter seeks to recover from the seller the difference between the amount realized upon such sale and the price paid the seller, his recovery may not be defeated merely because of his own purchase at the resale of such product, in the absence of any claim that such resale was for less than the market value thereof, where it appears that there has been no fraud and no unfairness manifested and the defendant at no time objected to or repudiated such sale or offered to satisfy the lien of plaintiff under the statute.—Wilson & Co. v. M. Werk Co., Ohio, 136 N. E. 202.

63.——Warranty.—Unless warranties are specifically assigned or are exceptional, as relating to quality, a buyer of personalty cannot recover on warranties, including warranties of title, of remote sellers; and this rule is not altered because the granting clause in the bills of sale includes "heirs, executors and assigns."—Peregrine v. West Seattle State Bank, Wash., 208 Pac. 35.

64.——Warranty.—Under Sales Act, § 17, subd. 6, an express warranty that a fur collar on a coat was not dyed did not necessarily negative an implied warranty of fitness for its intended purpose.—Flynn v. Bedell Co., Mass., 136 N. E., 252.

65. **Searches and Seizures**—Police Power.—It has always been permissible for police officers to follow criminals into their hiding places and to search the latter for evidence in support of a conviction, and where the circumstances are such as reasonably justify summary exercise of police power, the remedy afforded by Code Cr. Proc. § 792, may be applied without the issuance of a warrant to justify search and seizure.—People v. Milone, N. Y., 195 N. Y. S. 488.

66.——Reasonable.—If both lessor and lessee had free access to garage on leased premises and used it in common, and officers entered and searched the garage, and took a trunk and barrel therefrom at the invitation of and with the assent of lessee, in the presence of lessor, who disclaimed being in possession of the garage and having any interest in the trunk and barrel, the contents of the trunk and barrel, used as evidence in the prosecution of

the lessor for having unlawful possession of intoxicating liquor, in violation of the National Prohibition Act, held, not to have been obtained through an unreasonable search and seizure, in violation of Const. Amend. 4.—Driskill v. United States, U. S. C. C. A., 281 Fed. 146.

67.——Warrant.—Where a search warrant, issued on affidavit which did not positively assert the property was in the premises to be searched, permitted search in the nighttime, and the search was actually made in the nighttime, and no copy of the warrant and no receipt were delivered to the person in charge of the property taken, the search was an illegal one, and the person indicted on the strength of evidence procured by such warrant is entitled to have the indictment quashed and the property returned to him.—United States v. Yuck Kee, U. S. D. C., 281 Fed. 228.

68. **Statutes**—Authorized.—Act March 11, 1920 (Laws 1920, p. 922), requiring the registry of all vehicles in a designated county, and imposing a license fee the proceeds of which were to be applied to the construction and repair of roads, was not special legislation in violation of Const. Art. 3, § 34, subd. 9, prohibiting special laws where a general law can be made applicable, since that statute was enacted in the exercise of the taxing power under Article 10, § 5, authorizing the assessment and collection of taxes by counties for corporate purposes, and uniform in respect to persons and property within the jurisdiction of the body imposing the same, which is limited only by Section 6, fixing the purposes for which the tax may be levied.—State v. Touchberry, S. C., 113 S. E. 345.

69. **Street Railroads**—Crossing.—In an action for injuries to a passenger in an automobile stage struck by a street car approaching a street intersection from the automobile driver's right, where the position of the two vehicles which arrived at the intersection at about the same time was such that their lines of forward movement would cross each other, and it was undisputed that the automobile was driven on the track immediately in front of the street car, the ordinance requiring every driver to grant right to vehicle approaching from his right becomes a controlling factor, and it was not error to charge that the motorman was not required to anticipate anything not reasonably to be expected and that the street car company was not liable if the automobile was suddenly, without warning, driven onto the track immediately in front of or so close to the street car that the latter could not be stopped by exercising ordinary care.—Bryant v. Bingham Stage Line, Utah, 208 Pac. 541.

70.——Warning.—A truck driver watching two street cars approaching a street intersection from opposite directions had the right to assume that neither would exceed the speed limit, and it was the duty of the motorman on the one violating the law to give warning of danger.—Swanson v. Pacific Northwest Traction Co., Wash., 208 Pac. 10.

71. **Sunday**—Judicial Act.—Entry by the clerk on January 2, which was Sunday, of an order granting a new trial, but dating the same December 31, preceding, was a judicial, and not a non-judicial, act, where the order, if made at all, was made on Sunday, and not on any other day, and, hence, such entry was void.—Jackson v. Dolan, Calif., 208 Pac. 315.

72. **Taxation**—Bonds.—New bonds, issued to pay matured bonds secured by the same mortgage, taxable under Tax Law, § 253, are not exempt under Section 259, limiting the tax to the outstanding principal indebtedness, although not increasing the indebtedness for which the mortgage is security at any one time, but are taxable as a new debt, since the latter section does not limit the tax to the principal indebtedness outstanding at any one time.—People v. Boston & M. R. R., N. Y., 195 N. Y. S. 402.

73.——Permit.—Tunnels across a street, joining buildings of a steam company on either side and forming an integral part of the plant, held properly taxable in connection with the company's real property; they being its property, having been constructed by it under permit from the city, to continue till revocation by the city, at its pleasure, but not more than 25 years, and to be then filled by it unless the city elected to take the tunnels, the company for the privilege to make annual payments, which should be in addition to any tax which might be required.—People v. Cantor, N. Y., 195 N. Y. S. 377

74. **Theaters and Shows**—Invitee.—Plaintiff, having purchased a ticket, on finding his seat unsatisfactory and leaving defendant's theater, gave his ticket to a companion patron, in order that the latter could, as allowed by the theater, exchange their tickets for another performance. While waiting for his companion, who was in the ticket line, plaintiff walked into an open court adjoining, and maintained by the theater by direction of New York City Building Code, Art. 25, § 527, subd. 2, which he had previously entered on numerous occasions when patronizing the theater, and where no warning signals were kept. Plaintiff stepped on a flush surface door to defendant's underground furnace room, which was defective and gave way, causing plaintiff to drop through, whereby he sustained injury. Held that, notwithstanding the open court was used largely by patrons between acts and in leaving after performances, it was a place provided for their general use, and defendant was bound to observe reasonable care to save harmless its invitees for profit, and that plaintiff was still such invitee and entitled to recover.—Brister v. Flatbush Leasing Corporation, N. Y., 195 N. Y. S. 424.

75. **Trusts**—Accomplished.—Where the purposes of a temporary trust have been fully accomplished, the trust estate will in equity be vested in those beneficially entitled thereto.—Prichard v. Prichard, W. Va., 113 S. E. 256.

76. **Vendor and Purchaser**—Notice.—An unrecorded deed to land in the State of Vera Cruz, Mexico, was good as against third parties with knowledge of its execution and delivery, under Civ. Code of Vera Cruz, Arts. 3057, 3081.—Mexican Gulf Oil Co. v. Compania Trans. D. P., S. A., U. S. D. C., 281 Fed. 148.

77. **War**—Wills.—The right of a citizen to bequeath personal property to a citizen of Germany before the war was not abridged by the declaration of war, nor did the bequest violate the Trading with the Enemy Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3115½a-3115½j) by becoming operative during the war.—In re Roeck's Estate, N. Y., 195 N. Y. S. 505.

78. **Waters and Water Courses**—Contracts.—An irrigation district organized under Rev. Code 1915, §§ 6416-6512, is a municipal corporation as respects its contracts made in the manner prescribed by law.—State v. Columbia Irr. Dist., Wash., 208 Pac. 27.

79.——Non-Payment.—In the absence of legislative authority, the general rule is that those furnishing the public with its water supply, either in a private or a municipal capacity, may adopt, as a reasonable regulation for conducting such business, a rule providing that the water so furnished may be cut off for non-payment therefor, and in pursuance of such regulation the water supply may be discontinued on the failure of the consumer to pay the water rates.—Dodd v. City of Atlanta, Ga., 113 S. E. 166.

80. **Wills**—Tenants in Common.—Where a testatrix devises property to her daughter and her children now living or hereafter born, the mother and her children, or all of the devisees, take the property as tenants in common of the fee, each owning the same undivided interest therein.—Reddoch v. Williams, Miss., 92 So. 831.

81. **Workmen's Compensation** — Employees.—A workmen's compensation policy, covering shopmen and clerical employees of a company engaged solely in repairing vessels on navigable waters, is valid, as the work of such employees is mostly on land, and the State Workmen's Compensation Law would apply to injuries sustained by them on land.—London Guar. & Acc. Co. v. Marine Repair Corp., N. Y., 195 N. Y. S. 492.